S.B.CRIMINAL LEAVE TO APPEAL NO. 340/2006

(M/s K.G.Traders Vs. M/s Devi Kripa Trading)

Date of order : 26/07/2007

HON'BLE MR.H.R.PANWAR, J.

Mr. P.N.Mohanani for the appellant-applicant.
Mr. D.D.Chitlangi for the resopndent.

By the instant criminal leave to appeal under Section 378 (4) Cr.P.C., the complainant appellant seeks leave to appeal against the judgment and order dated 6.9.2006 passed by Additional Chief Judicial Magistrate (Economic Offence) Jodhpur (for short 'the trial court' hereinafter) in Criminal Regular Case No.36/2006 whereby the trial court dismissed the complaint filed by the petitioner under Section 138 of the Negotiable Instruments Act, 1881 (for short 'the Act' hereinafter).

I have heard learned counsel for the appellant. Carefully gone through the judgment and order impugned as also record of the trial court.

The complainant filed a complaint under Section 138 of the Act before the trial court on 24.11.2005. The trial court took the cognizance of the offence vide order dated 19.1.2006 and issued process. In pursuance of the process issued by the trial court, the accused respondent appeared before the trial

court on 6.5.2006 and was enlarged on bail. The substance of the accusation was read over and the matter was posted for evidence of the complainant on 5.7.06, 24.7.06, 7.8.06 and 6.9.06. The complainant failed to appear to make statement as witness as also did not produce witnesses on these dates. The trial court at the request of the learned counsel appearing for the complainant appellant granted opportunity to produce evidence on these dates, however on 6.9.06, when the matter was posted for evidence of the complainant and its witnesses, neither complainant appellant nor his counsel appeared. The trial court waited for evidence up to 4.15 P.M. and finding that neither the complainant nor his witnesses and counsel appeared, therefore, dismissed the complaint for non-prosecution. Hence this application for seeking leave to appeal.

Learned counsel for the appellant submits that the appellant complainant could not appear because of illness and therefore, the order dismissing the complaint be set aside and the matter may be remanded to the trial court for recording the evidence of the complainant. Learned counsel for the appellant has relied on a decision of Hon'ble Supreme Court in Mohd. Azeem Vs. A. Venkatesh and Anr. 2003 Cr.L.r. (SC) 211, wherein Apex Court held that the petitioner therein was prosecuting the complaint diligently and had been attending the Court of Magistrate on all dates excepting one because according to him

he wrongly noted the date for hearing. The facts of the case in hand are altogether different than that of Mohd. Azeem Vs. A. Venkatesh and Anr. (supra).

From the record, there is absolutely no material showing that the complaint fell sick on 5.7.06, 24.7.06, 7.8.06 and 6.9.06. This shows that after filing the complaint the complainant appellant has not all been diligent in prosecuting the case so much so on none of the dates noticed above the complainant appeared. However, on certain occasions counsel for the complainant appeared and sought adjournment for producing the evidence which ultimately resulted in even non-appearance of the counsel because since the complainant did not appear as witness after having been availed so many opportunities, the counsel could not have been in a position to produce any evidence and therefore, he also did not appear. In the circumstances, therefore, in my view, it is not at all a fit case warranting grant of leave to appeal to this Court. The application seeking leave to appeal is therefore, dismissed.

(H.R.PANWAR),J.

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